

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Application of Shell Energy North America  
(US), L.P. for Rehearing of Commission  
Resolution E-5158

A.21-09-020

**APPLICATION OF SHELL ENERGY NORTH AMERICA (US), L.P.  
D/B/A SHELL ENERGY SOLUTIONS FOR REHEARING OF DECISION  
22-03-036**

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In accordance with Public Utility (“P.U.”) Code Section 1731(b)(1) and California Public Utilities Commission (“Commission”) Rule of Practice and Procedure (“Rule”) 16.1, Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions (“Shell Energy”) files this application for rehearing of Decision 22-03-036 (“Decision”). The Decision was approved at the Commission’s March 17, 2022 voting meeting and was issued on March 18, 2022. Shell Energy also requests oral argument pursuant to Commission Rule 16.3.

**I. INTRODUCTION**

Shell Energy is a load serving entity (“LSE”) with an obligation to procure, among other things, sufficient resources to serve constrained areas (“Local RA” requirement). In its more than 15-year history of serving discrete loads across California, Shell Energy has consistently met its Local RA procurement requirements, including in the region called “PG&E Other.”

In 2019 and 2020, the Commission implemented certain structural changes that rendered it nearly impossible for LSEs to successfully procure Local RA capacity, especially in the PG&E Other local capacity area. These changes, further described below, resulted in the majority of LSEs failing to meet their Local RA obligations in 2020 (20 LSEs filed for Local RA waivers, out of 39 LSEs total), and almost half (20 LSEs filed for Local RA waivers, out of 42 total LSEs)

in 2021. These structural changes were so problematic that in 2021, the Commission reversed some of these structural changes and Energy Division staff acknowledged the close-to-impossible task it had set.

Nonetheless, at the time these structural changes were in place, Shell Energy undertook all commercially reasonable measures to procure its share of Local RA obligations. Among these measures, and based on its deep marketing and trading experience, Shell Energy opted for a targeted solicitation rather than a blanket request for offers (or “RFO”). In Shell Energy’s estimation, a blanket RFO would only extend Shell Energy’s reach to irrelevant stakeholders and be a fruitless effort. When it became apparent that no Local RA capacity was available in PG&E Other, like several other similarly situated LSEs, Shell Energy timely filed a Request for Waiver of its Local RA obligation. Shell Energy’s Request for Waiver was denied in part by the Commission on the sole basis that Shell Energy “did not hold an RFO” (Resolution E-5158 at 6), ostensibly contrary to the requirements of D.06-06-064.<sup>1</sup>

In September 2021, Shell Energy filed an Application for Rehearing (“AFR”) of Resolution E-5158 (“Resolution”), raising the argument that its targeted solicitation approach constituted an “other form of solicitation” permitted under D.06-06-064 as an alternative to an RFO. The Commission denied the AFR in D.22-03-036 (“Decision”), stating that D.06-06-064 “requires that Shell Energy demonstrate that it ‘pursued *all* [emphasis added] commercially reasonable efforts to acquire the resources needed’ to meet its local procurement obligation.” Decision at 2 (citing D.06-06-064 at 73).

The Decision errs as a matter of law and violates P.U. Code Section 1757(a) for the reasons set forth below.

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<sup>1</sup> Out of the 20 LSEs that had filed for Waiver in 2020, only Shell Energy and two other Electric Service Providers (“ESPs”) were denied their requests.

- First, the Decision fails to juxtapose the reading of two key provisions in D.06-06-064, violating basic principles of statutory and regulatory interpretation and leading to a misapplication of the requirements established in that decision; therefore the Commission failed to “proceed[ ]in the manner required by law” in violation of P.U. Code Section 1757(a)(2), and in violation of P.U. Code Section 1708, which requires notice and an opportunity to be heard prior to altering or amending a prior Commission decision;
- Second, the Decision, like the Resolution, fails to analyze the sufficiency of a targeted solicitation versus a blanket RFO as a commercially reasonable effort, and therefore the Decision is not supported by “substantial evidence in light of the whole record,” in violation of P.U. Code Section 1757(a)(4);
- Third, the Decision retroactively and without proper administrative procedure modifies the standard applicable to evaluating requests for Local RA waivers without a sufficient evidentiary basis for doing so, which constitutes an abuse of discretion in violation of P.U. Code sections 1708 and 1757(a)(5);
- Fourth, the Commission’s changes to the resource adequacy (“RA”) program for the 2020 compliance year rendered it impossible for Shell Energy to comply with its year-ahead Local RA obligations, and refusing to grant a waiver to Shell Energy for a standard that was impossible to achieve also constitutes an abuse of discretion in violation of Section 1757(a)(5);
- Fifth, in reviewing year-ahead Local RA waiver requests for both 2020 and 2021 compliance years, the Commission only refused to grant waivers to ESPs—community choice aggregators’ and investor-owned utilities’ waiver requests

were uniformly approved, and this discriminatory treatment between LSEs is a further abuse of the Commission’s discretion in violation of Section 1757(a)(5); and

- Sixth, the Decision impermissibly violates Shell Energy’s due process rights by materially modifying the underlying Resolution on which Shell Energy’s AFR is based, instead of granting Shell Energy’s AFR, yet again retroactively and materially changing the standard to which Shell Energy is held, in violation of the California Constitution and P.U. Code section 1757(a)(6).

For these reasons, Shell Energy respectfully requests the Commission grant rehearing, and grant Shell Energy’s waiver request for its 2020 year-ahead Local RA obligation.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

As indicated above, a series of changes to the RA program created a “perfect storm” of circumstances that led to widespread deficiencies in Local RA capacity in PG&E Other in 2020. This section describes those program changes, which rendered it virtually impossible for LSEs to meet their Local RA obligations.

### **A. Commission’s Revisions to the RA Program Created Unprecedented Challenges for Local RA Capacity Procurement for 2020**

Issued in February 2019 and applicable to the 2020 compliance year, D.19-02-022 made a number of material revisions to the RA program, including:

- Disaggregating the PG&E Other local capacity area into six smaller local areas—Fresno, Sierra, Kern, Stockton, Humboldt and North Coast/North Bay — significantly complicating compliance for LSEs with Local RA obligations for that area; and

- Establishing a multi-year RA requirement that obligated LSEs to procure 100 percent of their Local RA requirements for compliance years 2020 and 2021, and 50 percent of their Local RA requirements for compliance year 2022.

On July 5, 2019, the Commission also adopted revised Effective Load Carrying Capability (“ELCC”) values for wind and solar for the 2020 compliance year. *See* D.19-06-026 at 48-49. The revised values reduced the RA capacity available from wind and solar.

D.19-02-022 directed the Energy Division to prepare reports analyzing, among other things, the number of Local RA waiver requests and the reason for the deficiencies. Pursuant to this direction, on January 13, 2020, the Energy Division issued “The State of the Resource Adequacy Market – Revised” (“ED Report”), which reviewed October-December 2019 Month Ahead and 2020 Year Ahead filing information. In its Report, the Energy Division concluded that:

**it may not be possible** for LSEs to meet requirements in all local areas due to . . . adoption of revised ELCC values and disaggregation of the PG&E Other local area.

Report at 40 (emphasis added). Also,

[t]he total level of generating capacity available in the Kern, Sierra, and Stockton local areas is very close to the 2020 local requirement for those areas. Additionally, the local requirements were generated using the 2019 NQC list, so they do not reflect reduced solar and wind effective load carrying capability (ELCC) values adopted for 2020.

*Id.* at 35.

The Energy Division went on to note that “[i]n addition, non-CPUC jurisdictional LSEs may have capacity in these local areas that they are unwilling to sell because they do not have disaggregated local requirements.” *Id.* at 40-41. These non-CPUC jurisdictional LSEs included

municipal utilities that owned 20 percent of the capacity in the Stockton subarea and 54 percent of the capacity in the Sierra subarea. *See* D.20-06-031 at 68.

**B. Shell Energy Made Numerous, Good-Faith Attempts to Meet Its Local RA Requirements for the “PG&E Other” Local Areas**

Due to the limited capacity available to meet its Local RA obligations in the PG&E Other local capacity area as a result of these regulatory changes, Shell Energy reasonably concluded that a blanket RFO was not a commercially reasonable method of obtaining the required capacity. Shell Energy chose to pursue a very targeted procurement effort to meet its 2020 through 2022 RA compliance obligations for these areas by reaching out directly to the limited number of entities holding capacity that could meet the requirements for the subareas previously aggregated under the PG&E Other area. Leading up to the deadline for its year-ahead compliance filing, Shell Energy repeatedly reached out directly to 12 other LSEs and to a broker/trader, the entities Shell Energy determined were most likely to hold capacity in the Stockton local capacity area (the only local capacity area for which Shell Energy was deficient for RA compliance year 2020). Shell Energy also bid into PG&E’s solicitation in an attempt to procure the required Local RA capacity. Resolution E-5158 at p. 2 (citing Letter for Reconsideration of Energy Division Denial of Shell Energy North America Advice Letter 20-E at pp. 1-2).

For its 2020 year ahead compliance obligation, Shell Energy was deficient only in procuring sufficient RA capacity for the Stockton subarea. The California ISO’s November 12, 2019 “Evaluation Report of Load Serving Entities’ Compliance with 2020 Local and System Resource Adequacy Requirements” illustrates just how limited Local RA capacity was in the Stockton area—only 11 generators are listed as having capacity available, with all but three of

the listed generators having a megawatt or less of available capacity.<sup>2</sup> Those generators also include hydroelectric facilities owned by public agencies which the Energy Division later concluded lacked any incentive to sell Local RA capacity. Given the very limited number of entities that held capacity that could meet Shell Energy’s Stockton subarea need, a blast RFO to huge numbers of counterparties that did not hold the capacity needed would have been a pointless exercise—a targeted solicitation addressed to those entities who actually held the relevant capacity and might be willing to sell such capacity, in Shell Energy’s reasoned and experienced opinion, was the only logical procurement strategy. Indeed, as the Decision recognizes, those LSEs that did issue an RFO for Local RA capacity fared no better than Shell Energy and emerged empty-handed. Decision at 3.

**C. The Majority of LSEs Failed to Procure Sufficient Local RA Capacity for the 2020 Compliance Year**

Shell Energy was not alone in its struggle to locate sufficient Local RA capacity, especially in the “PG&E Other” local capacity areas. Over half of the Commission-jurisdictional LSEs were unable to procure sufficient capacity to meet Local RA requirements—20 LSEs out of a total of 39 Commission-jurisdictional LSEs submitted local waiver requests due to the inability to procure Local RA. Resolution E-5158 at p. 4. Of those waiver requests, 18 sought waivers related to the disaggregated PG&E Other subareas—in addition to Shell Energy, only two other waiver requests (from, like Shell Energy, electric service providers or ESPs) were denied. The number of waiver requests in 2020 can be directly tied back to the Commission’s

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<sup>2</sup> Evaluation Report of Load Serving Entities’ Compliance with 2020 Local and System Resource Adequacy Requirements, November 12, 2019, Available at: [http://www.caiso.com/Documents/EvaluationReport\\_LoadServingEntitiesCompliance\\_2020Local\\_SystemResourceAdequacyRequirements.pdf](http://www.caiso.com/Documents/EvaluationReport_LoadServingEntitiesCompliance_2020Local_SystemResourceAdequacyRequirements.pdf) (cited at Resolution at 5).

revisions to the RA program discussed above—in 2019, prior to the changes, only 10 of 36 LSEs sought Local RA waivers.

The procurement experience of the other LSEs also illustrated that Shell Energy’s conclusion that conducting a broad-based RFO was not a commercially reasonable was correct. Other LSEs in Shell Energy’s position did conduct an RFO—yet they too failed to procure sufficient Local RA capacity to meet their 2020 compliance year obligations. Decision at 3. The problem was not that the LSEs seeking Local RA capacity did not choose all commercially-reasonable methods of procuring that capacity—the problem, especially in the disaggregated PG&E Other areas, was that the capacity simply was not available.

After making its 2020 year ahead compliance filing, Shell Energy continued to engage in extensive efforts to procure Local RA capacity for its month-ahead showing for 2020, with similar success. Shell Energy made repeated bids into PG&E’s RFO, and continued to reach out to potential counterparties in an effort to secure Stockton area capacity. In April 2020, Shell Energy sent a targeted solicitation to 42 counterparties—only three responses were received. In May 2020, Shell Energy sent a targeted solicitation to 47 counterparties, and only received two responses. In June and July 2020, Shell Energy sent targeted solicitations to 48 counterparties; in both cases, only receiving two responses. Despite these efforts, Shell Energy was unable to procure sufficient Stockton area capacity to meet its month-ahead obligations.

Given that disaggregating the PG&E Other likely made it impossible for LSEs to fully comply with their Local RA compliance obligations in 2020, the Energy Division (as well as Shell Energy and AReM) recommended that the Commission re-aggregate the PG&E Other subareas for the 2021 compliance year. *See* D.20-06-031 at 68. The Commission declined to do so but did relax the requirements for complying with the six subareas in PG&E Other. For those

areas, the Commission ordered that an LSE could fulfill its obligations by: (1) showing it had met the waiver requirements for its procurement from the disaggregated PG&E Other subareas, and (2) on an aggregated basis, it had met its PG&E Other area compliance obligations. D.20-06-031 at 70.

Despite this change to the compliance obligations for PG&E Other, 20 LSEs again sought a Local RA waiver for their 2021 year-ahead compliance obligations; 18 related to the PG&E Other subareas. Of those 18, 10 (including Shell Energy) met the PG&E Other obligation on an aggregated basis, eight did not. Only one LSE was denied a waiver, and, like Shell Energy, it was an ESP.

Shell Energy's continued difficulties in procuring Local RA capacity for its 2020 month-ahead obligations, and the difficulties that LSEs continued to experience in compliance year 2021 in obtaining PG&E Other capacity again illustrate that compliance with the Commission's PG&E Other Local RA obligation simply was not possible given market constraints and the limited amount of capacity available in the PG&E Other subareas.

#### **D. Shell Energy's Local RA Waiver Request**

Shell Energy was unable to procure sufficient Local RA capacity for 2020 due to the numerous challenges described above, and on October 31, 2019, Shell Energy filed a waiver request via Advice Letter 20-E for its 2020 year-ahead Local RA requirement in three of the disaggregated PG&E Other local areas for compliance years 2020, 2021, and 2022. On June 1, 2020, the Energy Division issued a disposition letter denying Shell Energy's waiver request, and Shell Energy sought review of that denial. On August 19, 2021, the Commission issued Resolution E-5158, granting Shell Energy's year-ahead Local RA waiver request for 2021 and 2022, and denying Shell Energy's year-ahead Local RA waiver request for compliance year 2020, related to Shell Energy's failure to procure sufficient capacity in the Stockton subarea.

**E. The Commission Failed to Follow Established Commission Precedent in Resolution E-5158**

Section 3.3.12 of D.06-06-064 established the requirements that LSEs must meet to be eligible for a waiver. That section provides, in full, that in requesting a waiver, LSEs must show:

- (1) a demonstration that the LSE reasonably and in good faith solicited bids for its RAR capacity needs along with accompanying information about the terms and conditions of the Request for Offer or other form of solicitation, and
- (2) a demonstration that despite having actively pursued all commercially reasonable efforts to acquire the resources needed to meet the LSE's local procurement obligation, it either
  - (a) received no bids, or
  - (b) received no bids for an unbundled RA capacity contract of under \$40 per kW-year or for a bundled capacity and energy product of under \$73 per kW-year, or
  - (c) received bids below these thresholds but such bids included what the LSE believes are unreasonable terms and/or conditions, in which case the waiver request must demonstrate why such terms and/or conditions are unreasonable.

After quoting the relevant standard, however, the Resolution immediately ignores it, concluding that Shell Energy did not qualify for a waiver solely because it did not hold an RFO. The Resolution provided no analysis as to whether the extensive efforts that Shell Energy had engaged in to procure Local RA—including bidding into PG&E's solicitation, and soliciting Local RA capacity from 12 other LSEs and a broker-trader—constituted all commercially reasonable efforts to acquire Local RA. Instead, ignoring the fact that D.06-60-6-064 only required that LSEs “reasonably and in good faith solicit bids” **either** through a “Request for Offer **or other form of solicitation**” (emphasis added), the Resolution concluded that Shell Energy had failed to “make every commercially reasonable effort” to procure Local RA resources solely because it had not conducted **both** an RFO **and** another form of solicitation.

Resolution at 5-6. Nor did it conduct any analysis as to whether an RFO would have been a commercially-reasonable action— particularly in light of the evidence from Local RA waivers and the Energy Division’s own analysis that regardless of the solicitation methods employed, the capacity simply was not available.

The Resolution effectively created a new standard for Local RA waivers not previously disclosed in any prior Commission decision. To qualify for a Local RA waiver, an LSE was required to conduct an RFO. Failure to conduct such an RFO would be deemed to be a failure to engage in commercially reasonable efforts, regardless of whether such an RFO was in fact a commercially reasonable approach to procuring Local RA, in a constrained market where sufficient Local RA capacity was not available. In other words, even if an LSE “had actively pursued all commercially reasonable efforts” to procure Local RA as required by D.06-06-064 through an “other form of solicitation,” the failure to conduct an RFO would bar it from obtaining a waiver.

Prior to the adoption of the Resolution, Shell Energy timely provided comments, informing the Commission that the Resolution failed to make any finding that a blanket RFO would have been any more effective, i.e., “commercially reasonable” than the targeted solicitations in which Shell Energy engaged. Although the final Resolution notes that Shell Energy identified this issue in comments, the Resolution was not revised prior to adoption to include any analysis of whether an RFO should be deemed commercially reasonable, especially where, as Shell Energy noted in its comments, Local RA capacity for some of the PG&E Other subareas was simply impossible to find, and LSEs that had conducted RFOs were also unsuccessful. *See* Resolution at 7.

Shell Energy timely filed an AFR of the Resolution. In its Application, Shell Energy

again noted that the Resolution failed to comply with existing Commission precedent by ignoring the standards set forth in D.06-06-064, and that it failed to provide any evidence to support its conclusion that an RFO was de facto commercially reasonable, or even to analyze the evidence that Shell Energy presented showing that an RFO was not a commercially reasonable approach. Finally, Shell Energy argued that the Commission had violated Shell Energy's due process rights by effectively changing the waiver criteria without providing Shell Energy any notice of that change in law until after Shell Energy had conducted its Local RA procurement and was subject to potential penalties for failing to comply with the previously-undisclosed requirement. Nor had the Commission given Shell Energy, or any other LSE, the opportunity to be heard concerning the adoption of the new requirement that every LSE conduct an RFO for Local RA capacity.

The Commission failed to provide any evidence, or even analysis, showing that an RFO was commercially reasonable. By contrast, Shell Energy provided strong evidence that an RFO would not have resulted in procurement—other LSEs with the same compliance obligations as Shell conducted an RFO and were unsuccessful. Absent analysis or evidence as to why an RFO would have been anything other than a futile effort, the Commission could not reasonably conclude that issuance of an RFO would be a “commercially reasonable” effort.

#### **F. The Commission Modifies Resolution E-5158 and Denies Rehearing of the Resolution, as Modified**

On March 18, 2022, the Commission issued D.22-03-036, modifying Resolution E-5158 and denying rehearing of the Resolution, as modified.

D.22-03-036 modified five sentences of Resolution E-5158, making similar revisions to each. The Resolution had stated repeatedly that the sole reason that it was denying Shell Energy's request for Local RA waiver was that Shell Energy had failed to conduct an RFO. It

conducted no analysis of Shell Energy’s procurement efforts to determine whether Shell Energy had engaged in all commercially reasonable efforts to procure Local RA capacity—the sole “evidence” the Resolution relies upon in concluding that Shell Energy failed to engage in commercially reasonable efforts is the lack of an RFO.

The Decision modifies five sentences of the Resolution, however, in an attempt to obfuscate that fact. The Resolution originally stated in the first sentence of the fourth paragraph of page five that:

Energy Division denied Shell Energy’s local waiver request because Shell Energy did not issue a solicitation via a Request for Offer (RFO).

The Decision revises this to state (added language in italics):

Energy Division denied Shell Energy’s local waiver request because Shell Energy did not *demonstrate that it pursued all commercially reasonable efforts when it* did not issue a solicitation via a Request for Offer (RFO).

The remaining four revisions are nearly identical. The Decision adds the following italicized language to paragraph four on page six of the Resolution:

But even under the previous rules prior to 2020, Shell Energy would not have met the criteria for a waiver of their 2020 Local RA deficiency because they *did not show that they “made every commercially reasonable effort” to meet their obligations when they* did not hold an RFO. *Likewise, Shell Energy’s Request for waiver under D.06-06-064 states that the standard for granting a local waiver is that the LSE “has made every commercially reasonable effort to contract for Local RAR resources.”*—was required to include a demonstration that Shell Energy “pursued all commercially reasonable efforts” to meet its 2020 local resource adequacy requirements. (*Id. at p. 73.*) Shell Energy did not *demonstrate that it pursued all* ~~make every~~ commercially reasonable efforts by not holding an RFO, therefore, *Shell Energy’s request* does not meet the standards for granting their local waiver.

Finally, the Decision revises Finding 8 on page eight from:

It was not commercially reasonable for Shell Energy to fail to hold an RFO.

To the following:

Shell Energy did not demonstrate that it pursued all commercially reasonable efforts when it failed to hold an RFO.

In rejecting Shell Energy’s request for rehearing, the Decision ultimately concludes that “[t]he Resolution explained that Shell Energy was required to demonstrate that it pursued all commercially reasonable efforts to acquire the resources needed and it did not do so,” and therefore Shell Energy’s Local RA waiver request was properly denied.

Even with the Decision’s modifications to the Resolution, however, the Resolution in no way supports the interpretation the Decision attempts to place on it. Shell Energy did present abundant evidence that it was not commercially reasonable to issue an RFO—numerous LSEs in Shell Energy’s position did issue an RFO, and yet still were required to seek a waiver. Shell Energy provided evidence of the strategies it used in an attempt to procure Local RA capacity and explained why it believed those actions were commercially reasonable, in light of the limited availability of Stockton subarea capacity. Neither the Resolution, nor the Decision, offer any analysis of that evidence. The sole “evidence” that both the Resolution and the Decision rely upon is Shell Energy’s commercially reasonable decision not to issue an RFO.

**III. THE DECISION ERRS AS A MATTER OF LAW IN RETROACTIVELY ALTERING THE STANDARD OF REVIEW ESTABLISHED IN D.06-06-064, BLATANTLY IGNORING EVIDENCE IN THE RECORD ESTABLISHING SHELL ENERGY ACTED IN A “COMMERCIALY REASONABLE” MANNER, AND VIOLATES SHELL ENERGY’S CONSTITUTIONAL RIGHTS**

The Decision is unlawful, and rehearing must be granted, for the following reasons:

- First, the Commission misapplied D.06-06-064 by blatantly ignoring Shell Energy’s “commercially reasonable efforts” to procure Local RA capacity

through several “other form[s] of solicitation” and by attempting to retroactively alter the requirements of D.06-06-064 both in the Resolution and then again in the Decision to support its denial of Shell Energy’s waiver request. By doing so, it failed to act “in the manner required by law,” contrary to the requirements of P.U. Code Section 1757(a)(2) and violates P.U. Code Section 1708, which requires that the Commission provide “notice to the parties, and with [an] opportunity to be heard” prior to altering or amending any prior order of decision.

- Second, the Commission ignored extensive evidence submitted by Shell Energy showing that its solicitation efforts were commercially reasonable, and that the Commission’s suggested procurement method—a blanket RFO—was not. By failing to properly consider or analyze that evidence, the Commission’s Decision is “not supported by substantial evidence in light of the whole record,” and therefore also violates P.U. Code Section 1757(a)(4).
- Third, the Commission’s failure to evaluate Shell Energy’s evidence, its claim that Shell Energy failed to produce evidence while the record is replete with examples to the contrary, and its actions in retroactively modifying the standards for Local RA waivers in the absence of any notice or opportunity to be heard, constitute an “abuse of discretion” in violation of P.U. Code Section 1757(a)(5).
- Fourth, the Commission’s repeated tweaking of the standards by which Shell Energy’s Local RA waiver request will be reviewed in order to support its denial of that request ignores the elephant in the room—Shell Energy’s failure to obtain Local RA had nothing to do with its solicitation methods, and everything to do with the Commission’s imposition of Local RA obligations that were impossible

to fulfill. The 2020 compliance year rule changes rendered compliance with Local RA obligations impossible to perform, and therefore holding Shell Energy to these “impossible” standards constituted a further “abuse of discretion” in violation of P.U. Code Section (a)(5).

- Fifth, in the wake of imposing these impossible standards, it appears that the Commission granted waivers to all but three entities seeking waivers of Local RA obligations—Shell Energy and two other ESPs. Not a single community choice aggregator or investor-owned utility was penalized for failing to meet its 2020 year-ahead Local RA obligations. The Commission therefore appears to be imposing more stringent requirements on ESPs, also constituting an abuse of its discretion in violation of P.U. Code Section 1757(a)(5).
- Sixth, the Commission’s revisions to the Local RA waiver review standard set forth in D.06-06-064, first in the Resolution, and then in the Decision, without granting rehearing or otherwise providing Shell Energy an opportunity to be heard or to address the evolving standard of review, constitutes a violation of Shell Energy’s due process rights, in violation of P.U. Code Section 1757(a)(6).

**A. The Commission Failed to Proceed “In the Manner Required By Law” by Misapplying D.06-06-064, Omitting Crucial Legal Analysis, and Failing to Follow Proper Procedure in Revising the Standard for Granting Local RA Waivers**

There is no dispute that the applicable standard for reviewing a request for waiver of Local RA procurement obligations is set forth in D.06-06-064: An LSE must show (1) that it “reasonably and in good faith solicited bids” either through (a) a “Request for Offer,” or (b) “other form of solicitation,” and that it (2) “actively pursued all commercially reasonable efforts to acquire the resources needed....” D.06-06-064 at section 3.3.12. Neither the Resolution nor

the Decision raise any issue with Shell Energy’s showing that it “reasonably and in good faith solicited bids”—Shell Energy submitted abundant evidence of its solicitation efforts with other LSEs, including PG&E, and its solicitation of a broker/trader.

Nor should there be any dispute that the bid solicitation required by an LSE to qualify for a waiver can be **either** through a “Request for Offer **or** other form of solicitation.” (Emphasis added). The Decision grudgingly admits as much, conceding that “[t]he language of D.06-06-064 does include the ability to use an ‘other form of solicitation.’” Decision at 2. Yet the Resolution replaced the “or” in D.06-06-064 with “and”—it denied Shell Energy’s RA Waiver request because it had not conducted an RFO, even though D.06-06-064 clearly acknowledges that the bid solicitations may be by way of an “other form of solicitation.” In its AFR of the Resolution, Shell Energy established that the Commission had misapplied D.06-06-064 by requiring an RFO. The Commission should have therefore either: (1) applied the correct standard and granted the Local RA waiver request, or (2) at a minimum, granted rehearing to review the Local RA request pursuant to the appropriate standard.

The Decision did neither. Instead, it applied the review standard in a way that was inconsistent both with the Resolution and with D.06-06-064. The Decision acknowledged that D.06-06-064 did not require an RFO. However, it attempted to read the RFO requirement back into D.06-06-064 by arguing that the requirement that an LSE show it engaged in “all commercially reasonable efforts” could be interpreted to require an LSE to engage in both an RFO **and** an “other form of solicitation,” and that it was Shell Energy’s burden to show an RFO was not “commercially reasonable.”

That too was a misinterpretation of D.06-06-064. D.06-06-064 allows an LSE to choose to conduct an RFO **or** other form of solicitation. Shell Energy chose to pursue an “other form of

solicitation,” a more targeted solicitation, because, as the evidence it provided to the Commission showed, a more targeted solicitation had a greater likelihood of success. D.06-06-064 then requires that Shell Energy show that its solicitation efforts were “commercially reasonable.” Shell Energy also submitted evidence showing that its efforts were commercially reasonable.

Nowhere in either the Resolution or the Decision does the Commission analyze whether Shell Energy’s efforts to procure capacity through an “other form of solicitation” were commercially reasonable, as required by D.06-06-064. Instead, the Decision changed the standard yet again by requiring Shell Energy to produce evidence that an RFO was not commercially reasonable. Setting aside the fact that Shell Energy did produce such evidence (discussed further below), the standard adopted by the Decision is inconsistent with the plain language of D.06-06-064.

The Commission’s repeated changes to the standard set forth in D.06-06-064, first in the Resolution and then in the Decision, not only misapplied D.06-06-064, it also violated P.U. Code Section 1708, which dictates the procedure by which the Commission may “rescind, alter, or amend any order or decision made by it.” Section 1708 requires that, prior to rescinding, altering or amending an existing order or decision, the Commission must provide “notice to the parties,” and must provide them with an “opportunity to be heard.” *See California Trucking Ass’n v. Pub. Utils. Comm’n*, 19 Cal.3d 240, 245 (1977) (holding that Section 1708 “opportunity to be heard” included the opportunity to introduce evidence). The Commission’s retroactive revisions to D.06-06-064, without providing the parties with notice or an opportunity to be heard, therefore violated P.U. Code Section 1708.

Changing the standard by which Shell Energy’s waiver request was reviewed, both in the Resolution and Decision, without ordering rehearing and affording Shell Energy an opportunity

to present evidence concerning its compliance with the evolving standard, also raises troubling questions concerning the Commission's application of its own rules. While the Commission may alter a decision or resolution after rehearing pursuant to P.U. Code Section 1736, it may only do so after "a consideration of all the facts, including those arising since the making of the order or decision." P.U. Code Section 1736. Rather than modify the Resolution and deny rehearing, the Commission should have granted rehearing and provided Shell Energy with an opportunity to be heard concerning the revised standard of review. Failing to do so not only violated Shell Energy's due process rights, as explained below, it was also inconsistent with the Commission's statutory authority set forth in P.U. Code Sections 1708 and 1736, and its own procedures. *Cf. S. California Edison v. Pub. Utils. Comm'n*, 140 Cal.App.4th 1085, 1106 (2006) (holding that the Commission failed to proceed in the manner required by law when it considered a new issue in late-filed comments and did not give parties sufficient opportunity to be heard).

**B. The Commission's Finding That Shell Energy Failed to Present Evidence to Meet Its Burden of Showing It Engaged in "All Commercially Reasonable Efforts" Blatantly Ignores the Evidentiary Record**

In an attempt to show that it applied the proper standard without having reviewed any of Shell Energy's evidence, the Decision repeatedly notes that it was Shell Energy's burden to present evidence that it engaged in all commercially reasonable efforts. It then concludes that Shell Energy failed to present such evidence, and therefore its waiver request was properly denied.

The record simply does not support that contention. Shell Energy provided extensive evidence of the various targeted solicitation efforts in which it engaged, including soliciting Local RA capacity from 12 other LSEs and a broker/trader, and bidding into PG&E's solicitation. It explained why, in light of the severely constrained Local RA market created by

the Commission's changes to the RA program that took effect for the 2020 compliance year, a targeted solicitation was commercially reasonable, unlike a blanket RFO. Shell Energy also presented evidence that it "was extremely difficult, and in many cases impossible, to find Local RA capacity in some of the local areas in the disaggregated PG&E Other area for the 2020 RA compliance year," Resolution at 7, a fact confirmed by the Energy Division in its Report. ED Report at 35, 40-41. This was particularly true for the Stockton area for which Shell Energy was deficient in the 2020 compliance year. *Id.* Additionally, Shell Energy pointed out that other LSEs had conducted blanket RFOs and had still failed to procure the required Local RA capacity. Decision at 3.

The Resolution addresses none of this evidence; the Decision only addresses the final point that RFOs did not prove successful for other LSEs. The Decision first contends that "this fact" "simply shows the market was constrained" and does not show that Shell Energy pursued "all commercially reasonable" efforts. Decision at 3-4. Later, it contends that the fact that other LSEs' RFOs were unsuccessful "does not prove that the broader approach [i.e., conducting RFOs] was commercially unreasonable." Decision at 5.

The fact that the market was severely constrained, with a very limited number of entities in possession of the Local RA capacity needed to meet Shell Energy's Local RA obligation, is apparently undisputed, and is precisely the reason why Shell Energy chose to conduct targeted solicitations directed at the entities that were likely to have the Local RA capacity, rather than issuing a blanket RFO to numerous entities that clearly did not. But that is not all that the evidence shows. The idea, as the Decision contends, that showing that an approach was repeatedly unsuccessful somehow does not provide at least some evidence that it is not a commercially reasonable approach is simply nonsensical. Put another way, the evidence shows

that it was not commercially reasonable to issue a blanket RFO under the circumstances.

Shell Energy provided evidence, as the Decision concedes, that the Local RA market was severely constrained, especially in the Stockton area. Shell Energy provided evidence that it engaged in a variety of commercially reasonable efforts to procure Local RA capacity. It presented evidence as to why, in a severely constrained market, it did not make commercial sense to issue a blanket RFO. And it presented evidence that a blanket RFO was not commercially reasonable because it would have been unsuccessful.

The Commission cannot simply ignore that evidence in declining to order rehearing of the Resolution. The Commission is obligated to consider “all relevant evidence, including evidence detracting from the decision” in order to meet its obligation to base its decision on “substantial evidence.” *Util. Reform Network v. Pub. Utils. Comm’n*, 223 Cal. App. 4th 945, 959 (2014) (citing *Lucas Valley Homeowners Ass’n v. Cnty. of Marin*, 233 Cal. App. 3d 130, 141-142 (1991)). In doing so in this case, the Decision is “not supported by substantial evidence in light of the whole record” in violation of P.U. Code Section 1757(a)(4), and the Commission must order rehearing.

**C. The Commission’s Repeated Misapplication of the Applicable Standard in D.06-06-064 and Its Blatant Disregard of the Evidence in the Record Constitutes an Abuse of Discretion**

The Commission’s failure to properly apply its own standards set forth in D.06-06-064, and its failure to evaluate and weigh the evidence presented by Shell Energy plainly constitutes an abuse of discretion, in violation of P.U. Code Section 1757(a)(5). *See City of Stockton v. Marina Towers LLC*, 171 Cal. App. 4th 93, 114 (2009) (finding that “[a] gross abuse of discretion occurs where the public agency acts arbitrarily or capriciously, [or] renders findings that are lacking in evidentiary support”).

The Commission repeatedly changed the standard to which Shell Energy would be held

concerning a Local RA waiver, first by requiring in the Resolution that Shell Energy conduct an RFO, and then by requiring in the Decision that Shell Energy show that “all commercially reasonable efforts” did not include **both** an RFO and an “other form of solicitation.” In repeatedly altering the standard to which Shell Energy would be held, the Commission also failed to give Shell Energy, or other LSEs, an opportunity to be heard on the revisions to the standard set forth in D.06-06-064 in violation of P.U. Code Section 1708, or even provide adequate notice to Shell Energy and other LSEs—the changes were made retroactively, well after the deadline for Shell Energy’s compliance filings.

In addition to subjecting Shell Energy to a constantly changing standard, the Commission has failed to engage in any meaningful way with the evidence that Shell Energy has submitted to the Commission to show it is entitled to a waiver of its 2020 year-ahead Local RA obligations. Shell Energy has submitted extensive evidence concerning its efforts to solicit bids for Local RA. The Commission has conducted no meaningful analysis concerning whether those efforts constitute “all commercially reasonable efforts” within the meaning of D.06-06-064. Shell Energy has also submitted extensive evidence concerning why a blanket RFO would not be commercially reasonable. The Commission has not engaged in any evaluation of that evidence either, other than to oddly claim that evidence that the RFO would likely have been unsuccessful is not evidence that it was not “commercially reasonable.”

The Commission’s failure to follow its own standards, and refusal to engage with the evidentiary record concerning Shell’s solicitation efforts constitute an “abuse of discretion” within the meaning of P.U. Code Section 1757(a)(5), and warrant granting rehearing of the Decision.

**D. The Commission's Changes to the RA Rules in 2019 Rendered It Impossible for LSEs to Comply with Local RA Obligations**

Shell Energy's failure to procure Local RA capacity in the PG&E Other local capacity area had absolutely nothing to do with the extent to which Shell Energy engaged in "commercially reasonable" efforts to solicit that capacity. The Commission's nit-picking concerning Shell Energy's solicitation efforts ignores the real reason why Shell Energy—and the majority of other LSEs—were unable to comply with Local RA compliance requirements. The Commission's changes to the RA rules, especially its decision to disaggregate the PG&E Other area, made it impossible for LSEs to procure sufficient capacity in those local areas to meet their Local RA compliance obligations.

The Energy Division has repeatedly acknowledged the significant challenges imposed on LSEs as a result of the changes to the RA rules for the 2020 compliance year, and recommended that the Commission re-aggregate the PG&E Other subareas for compliance year 2021 due to those challenges. *See, e.g.*, D.20-06-031 at 68-71. Though it declined to re-aggregate the PG&E Other area for purposes of year-ahead 2021 compliance, the Commission itself immediately took steps to reverse course on its disaggregation of the PG&E Other area for the following compliance year because of the difficulties created by that disaggregation. Effectively, the Commission rendered it impossible for Shell Energy to comply with its Local RA compliance obligations in 2020. It is therefore an abuse of discretion for the Commission to deny a waiver of that obligation for Shell Energy's 2020 year-ahead showing.

**E. The Commission's Decision to Deny Only ESP Waiver Requests Raises Questions of Improper Discrimination**

The Commission's refusal to grant Shell Energy's waiver request after rendering it impossible for Shell Energy to comply with that obligation alone constitutes an abuse of discretion. However, the Commission's denial of Shell Energy's waiver request, while

simultaneously granting waiver requests for numerous other LSEs, also raises concerns of improper discrimination against ESPs in general and Shell Energy in particular.

As noted above, the changes to the 2020 RA rules resulted in 20 out of a total of 39 LSEs filing requests for waivers of Local RA obligations. Eighteen of those waivers involved the PG&E Other local capacity area, and of those 18, all but three were granted. Including Shell Energy, all three of the entities denied a waiver were ESPs. The following year, as a result of the Commission failing to take sufficient action to address the inability of LSEs to comply with their obligations concerning the PG&E Other area, another 20 LSEs filed for year-ahead Local RA waivers, 18 of which involved the PG&E Other area. Seventeen of those waivers were granted (including Shell Energy's). The Commission denied only one waiver request, which, like 2020, was filed by an ESP. No community choice aggregator or investor-owned utility was denied a waiver request for 2020 or 2021 year-ahead Local RA compliance. Those statistics alone raise questions as to whether the Commission is imposing different requirements on Shell Energy, or ESPs in general, as compared to other types of LSEs. The Commission's failure to weigh the evidence that Shell Energy submitted in support of its waiver request only amplifies those concerns, and further supports granting rehearing. The Commission should grant rehearing of the Decision to ensure that it is properly and evenly applying the waiver standards applicable to Local RA waivers across various types of LSEs.

#### **F. The Decision Violated Shell Energy's Due Process Rights**

The Commission may not lawfully impose a new standard on an LSE and apply that standard to the LSE's past conduct. Imposing a mandatory RFO requirement after Shell Energy relied on the language of D.06-06-064 to conduct its solicitation for Local RA capacity places Shell Energy in jeopardy of a Local RA noncompliance penalty based on a standard of which it had no notice.

Rejecting Shell Energy’s Local RA waiver request based on a new standard is a denial of due process. Under the California Constitution, “[a] person may not be deprived of life, liberty, or property without due process of law.” Cal. Const., art. I, section 7, subd. (a). The Commission may not lawfully change the requirements in D.06-06-064 without proper notice and an opportunity for comment, as provided in P.U. Code Section 1708. These procedural requirements were not followed by the Commission in this instance. There was no “fair notice” of a change to the Commission’s Local RA waiver requirement.

In *Pacific Bell Wireless, LLC v. Public Utilities Commission*, 140 Cal. App. 4th 718, 740 (2006), the court of appeals stated: “[Fair notice] is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.” (Internal quotation marks and citation omitted.)

The Resolution and Decision unfairly and unlawfully “trapped” Shell Energy by applying a new standard that was not previously enacted or announced by the Commission. If, in D.06-06-064, the Commission had required every LSE to conduct an RFO to demonstrate that it acted in a commercially reasonable manner, Shell Energy would have been on notice of the requirement and would have acted accordingly. The Commission did not do so. Imposing such a requirement after the fact is contrary to due process. If the Commission decides that in the future, an LSE must issue an RFO to demonstrate that it has “pursued all commercially reasonable efforts” to obtain Local RA capacity, the Commission must modify D.06-06-064 through the appropriate process. The Commission may only apply a new compliance requirement

prospectively, however. Shell Energy reasonably relied on the language of D.06-06-064 in meeting its obligation to “pursue[ ] all commercially reasonable efforts” to obtain Local RA capacity in the Stockton local capacity area. The Commission erred as a matter of law by rejecting Shell Energy’s Local RA waiver request for 2020 based solely on the fact that Shell Energy did not issue a blanket RFO.

The Commission’s refusal to grant rehearing of the Resolution, while at the same time materially altering the standard applied to Shell Energy’s waiver request, also raises significant due process concerns, in addition to violating P.U. Code Section 1708. Rather than materially altering the Resolution, and then denying rehearing, the Commission should have granted rehearing to allow Shell Energy an opportunity to be heard on the altered standard. That is entirely the purpose of an AFR—to allow the Commission to order a new hearing if it has failed, as it has here, to correctly apply its own standards. The Commission’s decision to deny Shell Energy an opportunity to do so also constitutes a denial of due process, and a violation of P.U. Code Section 1757(a)(6).

#### **IV. REQUEST FOR ORAL ARGUMENT**

Shell Energy requests that the Commission grant oral argument on this Application, pursuant to Rule 16.3. Commission Rule 16.3 provides the criteria the Commission uses to determine whether oral argument is appropriate. Those criteria include where the decision “adopts new Commission precedent or departs from existing Commission precedent without adequate explanation,” or “change or refines existing Commission precedent.” Both these criteria apply to this circumstance. Both the Resolution and the Decision fail to properly apply the standard set forth in D.06-06-064, and neither the Resolution nor the Decision adequately explain the basis of the Commission’s denial of Shell Energy’s Local RA waiver request. Oral argument is therefore appropriate.

## V. CONCLUSION

The Commission must grant rehearing of the Decision because the Commission's rejection of a portion of Shell Energy's Local RA waiver request is contrary to law. D.06-06-064 does not require an LSE to issue an RFO to justify a Local RA waiver. Furthermore, the Decision's denial of rehearing is not supported by substantial evidence in light of the entire record. The Commission abused its discretion by applying a Local RA waiver eligibility standard that is not reflected in any Commission decision and is not supported by the facts. In addition, the Commission violated Shell Energy's due process rights by modifying D.06-06-064 without proper notice and without an opportunity for comment. In light of the circumstances facing all LSEs seeking Local RA capacity in the disaggregated local capacity areas of "PG&E Other" for the 2020 RA compliance year, Shell Energy's solicitation strategy was reasonable, reflected active pursuit of Local RA capacity, and represented its best commercial efforts. Contrary to the finding in the Resolution, Shell Energy did indeed "pursue[ ] all commercially reasonable efforts to acquire the resources needed." Rehearing of D.22-03-036 must be granted and the Commission's determination to reject Shell Energy's Local RA waiver request for the Stockton local capacity area for 2020 must be reversed.

Respectfully submitted,

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